STATE OF MICHIGAN

COURT OF APPEALS

COLLEEN MOELKE,

Plaintiff-Appellant,

v

MCPHERSON HOSPITAL EMERGENCY DEPARTMENT, and LOREN CHUDLER, D.O.,

Defendants-Appellees.

UNPUBLISHED
May 11, 2004

No. 245415
Livingston Circuit Court
LC No. 02-019453-NH

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from a trial court order granting defendants summary disposition pursuant to MCR 2.116(C)(7), based on plaintiff's failure to file a valid affidavit of merit with her complaint before the statute of limitations expired. We affirm.

We review de novo a trial court's decision to grant or deny summary disposition. *Mouradian v Goldberg*, 256 Mich App 566, 570; 664 NW2d 805 (2003). Summary disposition under MCR 2.116(C)(7) is appropriate when a claim is time-barred. *Id.* at 571. In reviewing a request for summary disposition pursuant to MCR 2.116(C)(7), we consider all the documentary evidence provided by the parties and accept as true all of plaintiff's well-pleaded allegations, unless they are contradicted by documentary evidence. *Id.*

MCL 600.2912d(1) provides that a plaintiff in a medical malpractice action "shall file with the complaint an affidavit of merit . . . ." "The substance of the affidavit, in essence, is a qualified health professional's opinion that the plaintiff has a valid malpractice claim." *Scarsella v Pollak*, 232 Mich App 61, 62-63; 591 NW2d 257 (1998) ("*Scarsella I*"), aff'd 461 Mich 547; 607 NW2d 711 (2000) ("*Scarsella II*"). In the instant case, plaintiff filed her medical malpractice claim on September 3, 2002, exactly two years from the date she was allegedly negligently treated for injuries sustained to her foot. MCL 600.5805(6) provides that the statute of limitations for a medical malpractice action is two years. Although plaintiff filed a purported affidavit of merit with her complaint, the affidavit was not notarized.

On appeal, plaintiff argues that the trial court's grant of summary disposition in favor of defendants was improper because the unnotarized document she filed with her complaint constituted a valid affidavit of merit pursuant to MCL 600.2912d(1). We disagree. Because an

unsworn "affidavit of merit" is no affidavit at all, *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 711-712; 620 NW2d 319 (2000), and because the filing of a complaint without the affidavit of merit does not commence the lawsuit, *Scarsella I*, *supra* at 64, the trial court correctly determined that plaintiff's complaint was barred by the two-year statute of limitation set forth in MCL 600.5805(6). The trial court's grant of summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) was proper because plaintiff's claim was time-barred.

On appeal, plaintiff argues that an affidavit of merit need not be notarized to comply with MCL 600.2912d, which provides in pertinent part:

> (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney *shall file with the complaint an affidavit of merit* signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice . . . .
>
> (2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1). [Emphasis added.]

Use of the word "shall" indicates that an affidavit accompanying the complaint is mandatory and imperative. *Scarsella I*, *supra* at 64. In addition, for a document to constitute a "valid affidavit" it must be: "(1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." *Holmes*, *supra* at 711. Thus, pursuant to *Holmes*, a document that is not notarized is not a "valid affidavit."

We conclude that *Holmes* was correctly decided. Plaintiff argues that the only statutory requirement is that a document be "signed," without any mention of any oath, affirmation, notarization, etc. However, that argument overlooks the fact that the statute requires an "affidavit," not merely a statement. "Affidavit" is a technical term that includes the requirement of an oath or affirmation being "taken before a person having authority to administer such oath or affirmation." *Scarsella I*, *supra* at 711. The statutory language specifically relating to the document being "signed" does not limit what an affidavit would otherwise require but, instead, specifies who the affiant must be (i.e., an appropriate health care professional).

Here, the document that plaintiff's expert signed, purporting to be an "affidavit of merit," was not notarized. As with the unsworn document at issue in *Holmes*, there is no indication that the information on the document was confirmed by plaintiff's expert's "oath or affirmation, taken before a person having authority to administer such oath or affirmation." Further, because plaintiff failed to provide an affidavit of merit, the complaint was insufficient to commence the action and did not toll the period of limitations. *Scarsella I*, *supra* at 64. Thus, the trial court properly granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7).

Plaintiff next argues that the trial court improperly granted summary disposition in favor of defendants, because it should have allowed plaintiff to amend the complaint and file a notarized affidavit of merit. We disagree. In *Scarsella I, supra* at 65, this Court considered and rejected the argument that a plaintiff in a medical malpractice action should be permitted to amend the complaint in order to file an affidavit of merit after the period of limitations has expired. As this Court explained, allowing a plaintiff in a medical malpractice action to amend the complaint to file an affidavit of merit after the period of limitations has expired would effectively repeal the requirement in MCL 600.2912d(1) that an affidavit of merit accompany the complaint in order to commence the lawsuit. Thus, where a plaintiff fails to furnish an affidavit of merit with the complaint before the expiration of the statutory period of limitations, plaintiff's claim is time-barred and the case is properly dismissed with prejudice. *Id*. at 62-65.

Further, although plaintiff correctly argues that MCR 2.116(I)(5) mandates giving parties an opportunity to amend their pleadings, MCR 2.116(I)(5) only mandates amendment to avoid summary disposition where the summary disposition motion is brought under MCR 2.116(C)(8), (9), or (10). Here, both defendants moved for summary disposition pursuant to MCR 2.116(C)(7). Accordingly, MCR 2.116(I)(5) is inapplicable.

Plaintiff next argues that the trial court erred in granting summary disposition in favor of defendants, because even the filing of a defective complaint tolls the statute of limitations. We disagree. In *Holmes* and *Scarsella I*, this Court considered whether a complaint unaccompanied by an affidavit of merit was sufficient to toll the statute and concluded that a complaint unaccompanied by an affidavit was not sufficient to commence the action or toll the limitations period. *Holmes*, *supra* at 714; *Scarsella I*, *supra* at 64. Despite this precedent, plaintiff cites numerous cases, none involving a medical malpractice action, for the proposition that defective complaints can toll the limitations period. Because none of the cases cited involve the affidavit of merit requirements our Legislature enacted for filing a medical malpractice action, they are inapposite.

Plaintiff further argues that under the unambiguous terms of MCL 600.5856(a), statutes of limitation are tolled at the time the complaint is filed and a copy of the summons and complaint are served on the defendant. However, this Court is bound to follow our Supreme Court's conclusion in *Scarsella II*, that the filing of the complaint, unaccompanied by an affidavit of merit, "is ineffective, and does not work a tolling of the applicable period of limitation." *Scarsella II*, *supra* at 553. See *Ferguson v Gonyaw*, 64 Mich App 685, 694; 236 NW2d 543 (1975).

Finally, plaintiff argues that the fact that her "affidavit of merit" was not notarized did not operate to prevent the trial court from obtaining jurisdiction over defendants. We disagree. Under *Scarsella I* and *II*, the filing of a complaint unaccompanied by the affidavit of merit neither commenced the action nor tolled the limitation period; therefore, the trial court never obtained jurisdiction over defendants.

We affirm.

/s/ Richard A. Bandstra
/s/ David H. Sawyer